Supreme Court, U. S.
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In the Supreme Court of the United States

No. 75-1326

LEWIS O. VICE,
Appellant,
vs.
J. A. FERGUSON AND THOMAS W. SANFORD,
SUBSTITUTE TRUSTEE,
Appellees,

MOTION TO DISMISS

AND

MEMORANDUM BRIEF IN SUPPORT

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In the Supreme Court of the United States

LEWIS O. VICE — Appellant

VERSUS — No. 75-1326

J. A. FERSUSON AND
THOMAS W. SANFORD,
SUBSTITUTE TRUSTEE — Appellees

MOTION

The Appellees now come before this Court and move to dismiss the Appeal filed in this matter and in support of this motion would show this Court the following, to-wit:

1. That this appeal should be dismissed for lack of jurisdiction as the alleged Constitutional question presented to this Court was not properly or timely raised in the prior trial or Appellate proceedings and therefore the Appellant is barred from first raising this point on appeal to the United States Supreme Court. The Mississippi Supreme Court, Circuit Court and County Court never had any opportunity to and never expressly rendered a decision on the constitutionality of the Replevin statutes complained of herein.

2. Or that, in the alternative, if there is a Constitutional question presented, this Appeal should be dismissed as that Constitutional question is of such an unsubstantial nature when viewed in light of the prior trial proceedings as to not merit consideration by this Court. The Judgment of the Mississippi Courts rests on a more than adequate non-Federal basis.

MEMORANDUM BRIEF IN SUPPORT

1. The Apellant herein has upon appeal to this Court attempted to present to this Court issues that are presently being raised for the first time or that have no relevancy to the action being appealed.

In the Appellant's statement of jurisdiction for this

Court he contends that this Appeal brings into question the Replevin statutes Section 2841 through 2869 Mississippi Code of 1942 as annotated and amended. This contention is entirely erroneous and misleading and is merely an attempt by the Appellant to fraudulently perfect jurisdiction by this Court. The cause of action being appealed is not an action under the Replevin statutes cited by Appellant but rather a judicial foreclosure of a chattel deed of trust.

By way of background and in order to place the Appellant's contentions in their proper perspective, I will briefly summarize the events in question.

1. On February 7, 1969, Appellee Ferguson instituted a replevin action under the aforementioned statutes but no hearing or final decision was forthcoming as Appellee Ferguson non-suited the replevin action on August 11, 1969.
2. On August 19,1969, Appellant herein filed a suit, Cause No. 51-917, in the County Court of the First Judicial District of Hinds County, Mississippi, for damages against Appellee Ferguson and others for an alleged wrongful replevin.
3. On November 6, 1969, the Appellant's suit, Cause No. 51-917, was dismissed on motion for non-suit filed by the Appellant herein, a copy of that order may be found in Minute Book 37 at Page 340 of the Minutes of the County Court of the First Judicial District of Hinds County, Mississippi.
4. On November 25, 1969, Appellees filed their Bill of Complaint for Foreclosure, Cause No. 52-486, in the County Court of the First Judicial District of Hinds County, Mississippi from which this Appeal has been taken.
5. On September 30, 1970, a hearing was held before County Court of the First Judicial District of Hinds County, Mississippi, on the Bill of Complaint for Foreclosure and Judgment was rendered in favor of the

Appellees.

6. On October 7, 1970, Appellant herein filed a motion for a new trial on the Bill of Complaint for Foreclosure. Said motion was denied December 8, 1970.

7. On December 17, 1970, Appellant posted bond and perfected appeal to the Circuit Court of the First Judicial District of Hinds County, Mississippi. On January 9, 1973, that Court affirmed the Judgment entered in favor of the Appellees on its Bill of Complaint for Foreclosure by the County Court.

8. On February 3, 1973, Appellant appealed the decision of the Circuit Court to the Supreme Court of the State of Mississippi. On November 10, 1975, the Supreme Court of the State of Mississippi affirmed the Judgment in favor of the Appellees on which this appeal was taken.

As can clearly be seen from this brief out-line of the facts and dates in question, there was no connection between the Replevin statutes or action herein complained of and the Bill of Complaint for Foreclosure which is the cause of action sought to be appealed. The Appellant herein might or might not have had a cause of action for the alleged wrongful replevin but whatever the merits of his claim that the replevin was wrongful, he chose not to pursue that claim for damages, and abandoned that action.

The Appellant attempted to complain of the allegedly wrongful replevin in the foreclosure action. The Appellant listed in his answer and affirmative defenses an extensive statement of facts relating to prior action between the parties but never made any allegation or offered any theory of law setting out the alleged wrongful replevin as a bar to foreclosure proceedings. The Appellant herein did not at anytime plead the prior replevin action as a bar to the foreclousre of the chattel deed of trust nor would it have bee a bar if pleaded as such.

The trial Court on numerous occasions ruled that the former replevin proceedings were irrelevant and immaterial to the case at bar. (R 162, 187, 188, 189). The Trial Court was never presented with any issue concerning the Constitutionality of the then existing Replevin statutes and as the matter at bar dealt with a judicial fureclosure, it could not have ruld on such an issue, if presented, as the Replevin statutes were totally irrelevant and immaterial to the issues before that Court.

The Appellant further alleges in his Jurisdictional Statement that the issues of the Constitutionality of the Mississippi Replevin statutes were raised upon appeal to the Circuit Court of the First Judicial District of Hinds County, Mississippi. However, a careful reading of the Assignment of Errors listed by the Appellant on page 33 et. seq. of his Jurisdictional Statment fails to disclose any Constitutional question being raised. Also upon examination of the complete Assignment of Errors sent to the Circuit court, no reference can be found to any Constitutional question. The first occasion upon which the Appellant argued any violation of his Constitutional rights guaranteed by the Fifth and Fourteenth Amendments was upon appeal to the Supreme Court of Mississippi from the decision of the Circuit Court affirming the ruling of the county Court. No mention of any Constitutional question was made either at the trial level in County Court or upon first appeal to the Circuit Court. (See Assignment of Errors, R 219-220)

The only Constitutional question raised or argued by Appellant to the Supreme Court of Mississippi concerned the form of the Judgment and whether that particular type of Judgment could be entered by the County Court in such a proceeding as a judicial foreclosure (See Appendix A).

Appellee therefore says under the laws of the State of Mississippi and the United States of America that since the alleged Constitutional questions presented to this Court were not raised at either the County Court trial level, or on appeal to the Circuit Court, the Appellant could not raise such points in the Mississippi Supreme Court for the first time, and indeed did not raise a constitutional question concerning the validity of the Replevin statutes in that Court.

As authority to support the above point, Appellees cite the case of **Nationwide Mutual Ins. Co. v. Tillman,** et al, 249 Miss. 141, 161 So. 2d 604, (1964), wherein the Mississippi Supreme Court made this statement, to-wit:

" . . . A long-established rule of law which has been recognized by this Court, namely, that if the lower court does not have the opportunity and right to pass upon the errors alleged to have been committed therein, we will not here for the first time consider those errors."

This principle has been followed in numerous other cases and the following are just a few of the cases where this rule of law was followed.

Humble Oil & Refining Co. v. Martin, 298 F. 2d 163;
Dilworth v. Riner, 343 F. 2d 226;
Alexander v. Eastland, 37 Miss. 554;
Gale v. Lancaster, 44 Miss. 423;
Anderson v. Leland, 48 Miss. 253; and
A. H. George & Co. v. Louisville & N. R. Co., 40 So. 486, 88 Miss. 306.

Therefore since no question of the validity of the Replevin statutes was raised at any stage of proceedings prior to appeal to this Court, the question of Constitutionality of the Mississippi Replevin statutes were not timely or properly raised in order ot be considered by this Court.

The first occasion upon which this Appellant has sought to challenge the Constitutionality of the Replevin statutes

is upon appeal to this Court. The Mississippi Courts were never afforded an opportunity to rule on the Constitutionality of the Replevin statutes complained of herein.

The Appellees therefore say that since no Federal question was raised timely or properly this Appeal should be dismissed for lack of jurisdiction.

2. In the alternative, if the Constitutionality of the Replevin statues was properly raised and the Replevin statutes are determined to have been a part of the prior proceedings in any wise, this appeal should be dismissed as the Constitutional question and the role played by the Replevin statutes in the judicial forclosure were of such an unsubstantial nature as not to merit consideration by this Court. The Judgment rendered by the County Court and affirmed upon appoal by both the Circuit Court and Supreme Court rests on a more than adequate non-Federal basis.

The case at bar deals with the Court supervised foreclosure of a chattel deed of trust. The Replevin statutes complained of were totally irrelevant to this proceeding. In order to avoid repetition, the Appellees will adopt and incorporate the arguments made in support of the first reason for dismissal.

The County Court exercised supervision of the foreclosure of the the chattel deed of trust and subseuent sale and entered orders in conformity with its ruling on the merits of the foreclosure and the applicable state laws dealing with such an action. The County Court's actions were examined upon appeal by both the Circuit Court and the Supreme Court of Mississippi and found to have been in accord with the foreclosure proceedings. The role, if any, played by the Replevin statutes was so insignificant that the Appellant's Constitutional rights could not have been affected in any manner. The judgment in this cause dealt with a judicial foreclosure and sale and not with replevin. The foreclosure procedure is

not attacked here or at any prior level as being unconstitutional. The attack is upon the Replevin statutes that had no material role or relevancy to the original cause of action. Therefore, this Appeal should be dismissed as involving no substantial Federal question since the Judgment entered by the State Court rests on a more than adequate non-Federal basis.

CONCLUSION

There is no Federal question presented in the case at bar.

No Federal question presented here was timely or properly raised so as to allow the Mississippi Courts to pass on the issue.

The issues raised in the Appeal are of no importance to the citizens of the State of Mississippi as the Legislature of the State of Mississippi in response to **Fuentes v. Shevin**, 407 US 67, 32 L.Ed. 2d 556, 92 S.Ct. 1983 [1972], repealed Sections 2841 through 2869 Mississippi Code of 1942 as annotated and amended (Now Sections 11-37-1 through 11-37-57 Mississippi Code of 1972 as annotated and amended) on July 1, 1975.

There is no state statute in controversy in the original case at bar which denies a citizen his Constitutional rights. For the foregoing reasons, this appeal should be dismissed for lack of Federal Jurisdiction.

Respectfully submitted,

/s/ Roy D. Powell
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APPENDIX A

POINT II

WHERE THE JUDGMENT ENTERED IS SO CONTRARY TO THE OVERSHELMING WEIGHT OF THE CREDIBLE EVIDENCE AS TO INDICATE PREJUDICE AND PASSION AGAINST THE APPELLANT AND SYMAPTHY FOR THE APPELLEES, IT IS THE DUTY OF THE COURT TO SUSTAIN A MOTION FOR A NEW TRIAL.

The appellant respectfully submits that the lower court erred in entering the judgment of September 30, 1970 in this cause of action after a trial on its merits, the judgment is void for the reasons set out hereinbelow and elsewhere in this brief as designated.

1. The law in effect at the time of the execution of the note and deed of trust must be followed in foreclosing same.

Appellee, J. A. Ferguson, claims an interest in the 1965 automobile by virtue of three documents, listed as follows:

A. On February 10, 1969, Henry P. Caldwell, Assistant Vice President of the Deposit Guaranty National Bank, made an assignment to appellee, J. A. Ferguson, on the back of a certain promissory note executed by appellee, J. A. Ferguson, on January 24, 1967, as the maker and made payable to the order of Deposit Guaranty National Bank. (R-141).

This assignment by the bank of appellee's note, after said note is paid and cancelled does not convey any interest of this appellant's property to the appellee, Ferguson, executed his "Affidavit in Replevin" on February 7, 1969, (R-181), and wrongfully seized and converted appellant's property to his appellee, own possession, profit, pleasure and benefit.

B. The second purported assignment dated November 24, 1969, is an instrument unattached, separate, and apart from the note and deed of trust which it purports to assign and does not convey any

legal interest in said property to appellee, J. A. Ferguson, (R-148).

This assignment purports to "assign, sell and convey, set over and deliver to J. A. Ferguson that certain promissory note and chattel deed of trust executed by J. A. Ferguson on January 24, 1967," approximately ten (10) months after appellee, Ferguson, executed his "Affidavit in Replevin," (R-181) and without notice wrongfully siezed appellant's property and converted same to his (appellee) personal use, possession, pleasure and benefit.

C. The third purported assignment dated February 2, 1970, is an instrument unattached, separate, and apart from the deed of trust which it purports to assign and does not convey any legal interest in said property to appellee, J. A. Ferguson. (R-146)

The third purported assignment attempts to assign a chattel deed of trust executed by the appellant, Lewis O. Vice, on March 25, 1968, with M. A. Lewis, Jr., as trustee and the Deposit Guaranty National Bank as beneficiary, covering a certain 1965 Ford Custom 500 four-door sedan automobile bearing Serial Number 5052C109366 and given to secure a promissory note of even date as stated therein.

The alleged note which represents the debt, was not assigned. Appellees did not produce the alleged note executed by this appellant on March 25, 1968, and presentment of the note with demand for payment was never made to this appellant.

Mr. J. D. King, Vice President of the Ellis Avenue Branch of the Deposit Guaranty National Bank was available as a friendly witness to the appellees, and as a bank officer who handled this appellant's loan on March 25, 1968, had full knowledge of the alleged note executed by this appellant on March 25, 1968 and the deed of trust of same date. Appellees refused to call Mr. King as a

witness, (R-176), to establish the note being sued on. (R-176)

Appellee, Thomas W. Sanford, substituted trustee, claims an interest by virtue of two documents executed by appellee, J. A. Ferguson; wherein the said documents purport to substitute Thomas W. Sanford as trustee in the place and stead of the said trustee, M. A. Lewis, Jr.

1. One document titled "Substitution of Trustee" executed by appellee, J. A. Ferguson, and dated November 24, 1969, purports to substitute Thomas W. Sanford as trustee in the place and stead of trustee, M. A. Lewis, Jr., on a chattel deed of trust executed by appellee, J. A. Ferguson, on January 24, 1967, and the Deposit Guaranty National Bank as beneficiary. (R-150)

Appellee, Ferguson's chatttel deed of trust dated January 24, 1967 makes no reference to appellant's note and chattel deed of trust dated March 25, 1968.

2. The second document titled "Substitution of Trustee" was executed by appellee, J. A. Ferguson, and dated February 20, 1970, and purports to substitute Thomas W. Sanford as trustee in the place and stead of trustee, M. A. Lewis, Jr., on a chattel deed of trust dated March 25, 1968, and executed by appellant, Lewis O. Vice, covering the above described 1965 Ford automobile wherein the Deposit Guaranty National Bank is made the beneficiary and the chattel deed of trust is given to secure a promissory note of even date, as stated therein. (R-152)

Thomas W. Sanford, the substituted trustee did not appear at the trial as a witness. No testimony was offered on the record that said trustee was foreclosing on the alleged note and deed of trust executed by this appellant on March 25, 1968.

The Deposit Guaranty National Bank attempted three assignments of the alleged debt, one on February 2, 1970. See Brasfield testimony, (R-176), wherein he states:

Vice: "Then here you are attempting to assign him the same note again. How did you reacquire the note?"

Brasfield: "We are assigning the rights which we retained in the note to Mr. Ferguson."

Section 93, Mississippi Code of 1942, recompiled.

Section 93. What constitutes a holder in due course.

"a holder in due course is a holder who has taken the instrument under the following conditions:

(1) That it is complete and regular upon its face.

(2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact.

(3) That he took it in good faith and for value.

(4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

Appelle, Ferguson, was never a holder in due course of the alleged note and chattel deed of trust, the alleged assignment was made to him by Brasfield representing the bank on February 2, 1970 over one (1) year after the due date of the alleged debt. It was not complete and regular on its face, the alleged promissory note and deed of trust executed by appellant on March 25, 1968 was lost or misplaced by the bank and the said bank attempted to transfer the debt without the note, see Vice testimony (R-123, 124, 125).

Powell: "Now, you say you executed some other instruments at the same time?"

Vice: "Yes, sir."

Powell: "And this consisted of a note and chattel deed of trust."

Vice: "Yes, sir."

Powell: "Do you know where the originals of these instruments are?"

Vice: "No, sir."

Said appellee did not take the instruments in good faith and was well aware and had notice that the alleged debt was past due, see Ferguson testimony, (R-158):

Vice: "And when did you pay the note off?"

Ferguson: "I paid the note off on February 10, 1969."

Section 100, Mississippi Code of 1942, recompiled.

Section 100. What constitutes notice of defect.

"To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith.

Appellant contends that appellee Ferguson took the alleged debt in bad faith.

Section 233. Mississippi Code of 1942, recompiled.

Section 233. Person primarily liable on instrument.

"The person 'primarily' liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are 'secondarily' liable."

Section 161, Mississippi Code of 1942, recompiled.

Section 161. When persons secondarily liable are discharged.

"A person secondarily liable on the instrument is discharged:

(1) By any act which discharges the instrument.

(2) By the intentional cancellation of his signature by the holder.

(3) By the discharge of a prior party.

(4) By a valid tender of payment made by a prior party.

(5) By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved.

(6) By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved."

Section 160, Mississippi Code of 1942, recompiled.

Section 160. Instrument-how discharged.

"A negotiable instrument is discharged:

(1) By payment in due course by or on behalf of the principal debtor.

(2) By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation.

(3) By the intentional cancellation thereof by the holder.

(4) By any other act which will discharge a simple contract for the payment of money.

(5) When the principal debtor becomes the holder of the instrument at or after maturity in his own right."

All of appellee Ferguson's notes and deeds of trust were discharged, null and void when this appellant executed a new promissory note and a new deed of trust on March 25, 1968 and when the Deposit Guaranty National Bank, without a legal right to do so, made demand on the appellee Ferguson and duped him into buying one of his old notes that he had executed on January 24, 1967. He discharged the alleged debt charged against this appellant on the note dated January 24, 1967 because under the Negotiable Instruments Laws of the State of Mississippi in effect on March 25, 1968, said note was discharged when the principal debtor becomes the holder of the instrument at or after maturity in his own right.

Appellant contends that under the laws of the State of Mississippi, the appellees did not have a cause of action against this appellant and the lower court should have granted appellant's motion for a directed verdict.

The appellees have failed to show a legal interest in the

subject matter, and the Supreme Court of the State of Mississippi in **St. Paul Fire Ins. Co. V. Auto Co.**, 121 Miss. 745, 83, So. 807, said:

"In an action, in a law court the plaintiff in order to sustain his cause of action, has to plead and prove as an essential element in his case, a legal title to the subject matter of litigation."

Appellees failed to prove a legal interest in the property in litigation and the lower court erred in sustaining appellees' motion. Appellant was prejudicated thereby and deprived of his constitutional right to his property and denied due process of law guaranteed to him by the Constitution of the State of Mississippi and the 5th and 14th amendments of the United States Constitution.

2. The judgment entered here does not conform to the finding of fact as stated in open court at the end of the trial of this cause on September 29, 1970. (R-193, 194)

3. On June 19, 1970, the lower court entered an order in this cause (that said cause of action would be moved from the equity side of the County Court to the law side of the court, the judgment entered here is not a law judgment and does not conform to the pleadings entered in this cause. (R-97)

4. A judgment must be complete in itself, and it was of course irregular in any view to attempt to reserve power to enter future judgments. In a law court, the action must be concluded by single judgment. (R-193,194)

7. The judgment fails to adjudicate the interest of the appellant in the note executed and dated March 25, 1968. (R-193, 194)

8. The judgment entered here on September 30, 1970 fails to adjudicate the interest of the appellee, Thomas W. Sanford, Substituted Trustee; and does not conform to the pleadings or the proof, as to appellee, Thomas W. Sanford, Substituted Trustee. (R-193, 194)

9. The judgment fails to state who is the owner of the

property to be sold and, "in the possession of the complainant." (R-193, 194)

11. The judgment here was entered for a greater amount than sought by the plaintiffs in their Amended Bill of Complaint. (R-193, 194)

12. The judgment entered here on September 30, 1970 is not specific and certain as to the amount of money awarded plaintiffs. (R-193, 194)

13. The interest of all parties in this cause of action was not adjudicated in the judgment entered here. (R-193, 194)

In **Watkins V. Blass, 164 Miss. 325, 145 So. 348**, the Supreme Court of the State of Mississippi held, that:

"The trial court erred by entering the judgment for a sum greater than that sought by the plaintiff in his declaration."

In **Sentry V. Sinclair, 130 Kan. 360, 286 P. 269**, the Supreme Court of the State of Kansas held that:

> "Judgment should not include interest where it was not alleged that note bore interest, and no interest was prayed for."

Appellant contends that a judgment for money must specify with definiteness and certainty the amount for which it is rendered and for this reason alone the judgment entered here must fail.

In **Claughton V. Black et al., 24 Miss. 188,** the Supreme Court of the State of Mississippi said:

> "We are therefore of the opinion, that if the judgment as entered upon the minutes, fails to give the amount of money adjudged to plaintiff, it is void, and cannot be corrected or rendered valid by the entry of the clerk."

Without belaboring the issues as discussed under Assigned Errors of this brief, appellant respectfully submits that the judgment entered in this cause on September 30, 1970 is contrary to the law, to the overwhelming weight of the credible evidence and does not

conform to the pleadings and the proof entered in this cause, said judgment constitutes a denial of appellant's property in derogation of the Constitution of the United States and the State of Mississippi, and denies this appellant due process and in an attempt to avoid repetition, appellant hereby relies upon the agruments and authorities as cited in this brief in support of the error assigned herein under Assigned Errors No.s I, III, IV, VI VII, IX, X, XI and XII for the purpose of this original brief, and hopes the same meets with the Court's approval.

PROOF OF SERVICE AFFIDAVIT

STATE OF MISSISSIPPI
COUNTY OF HINDS

I, Roy D. Powell, Attorney for the Appellees, depose and say that on the 17 day of May, 1976, I mailed a true and correct copy of the foregoing Motion to Dismiss and Memorandum Brief in Support to M. Charles May, Attorney at Law, 2610 West Capitol Street, Jackson, Mississippi 39209, Via First Class mail with sufficient postage placed thereon.

/s/ Roy D. Powell
ROY D. POWELL
Attorney for Appellees

Subscribed and sworn to before me at Jackson, Mississippi this 17 day of May, 1976.

/s/ Charlotte B. Anding
CHARLOTTE B. ANDING
Notary Public

My Commission Expires:
2 - 8 - 80